

Exhibit 5

Attorney General Kathy Jennings
102 W. Water Street
Dover, DE 19904

Sent via email

October 14, 2022

Re: Voter Eligibility for Incarcerated Voters

Attorney General Jennings:



100 W. 10th Street, Suite 706
Wilmington, DE, 19801
302-654-5326
www.aclu-de.org

Kathleen Epler
President

Mike Brickner
Executive Director

Dwayne J. Bensing
Legal Director

We, the ACLU of Delaware, respectfully request explicit assurance that no otherwise eligible incarcerated voters held in Delaware Department of Corrections (“DDOC”) facilities will be arrested or prosecuted in the event that they vote or attempt to vote absentee in the upcoming November 2022 elections.

As you are likely aware, the Delaware Supreme Court issued an expedited order affirming the September 14, 2022 Court of Chancery’s ruling, which found that the Vote by Mail statute was unconstitutional and that the Delaware Constitution’s enumerated circumstances allowing for absentee voting are exhaustive. The enumerated list of circumstances in the Delaware Constitution does not include individuals who are incarcerated.

In a September 20, 2022 letter—attached to this letter—the Delaware Department of Elections (“DDOE”) wrote that “otherwise eligible persons who are incarcerated” is an “absentee reason [] which falls under the ‘Business or Occupation’ reason set forth” in the Delaware Constitution. DDOE noted that this incarceration reason “has appeared on the Department’s absentee ballot application for several election cycles” and that DDOE “will continue to accept [] absentee ballot applications that are submitted with this reason.”

While the ACLU of Delaware appreciates these representations, eligible voters held in DDOC facilities—



pretrial detainees and people convicted of misdemeanor offenses—do not currently have assurances that the Delaware Attorney General and law enforcement share DDOE’s interpretation. As such, the ACLU of Delaware is gravely concerned that these voters do not have sufficient guidance and/or assurances from the State about their eligibility to vote in the November 2022 elections, and might potentially have to choose between exercising their fundamental right to vote and risking criminal prosecution.

Recently, around the country, we have witnessed a disturbing rise in the arrest and prosecution of voters—who lack any *mens rea* or intent to commit any crime—for voter fraud or improper voting, because those voters are confused about byzantine election laws and state officials decline to clarify their eligibility. It is imperative that we avoid this situation in Delaware by providing incarcerated voters with the guidance and certainty they need to be able to make informed decisions about their eligibility to vote in November.

As such, the ACLU of Delaware requests that the Attorney General provide explicit assurance that otherwise eligible incarcerated voters will not be arrested or prosecuted for voting or attempting to vote absentee from DDOC facilities in the November elections.

To be clear, moving forward, the current status quo is untenable for incarcerated voters, who at this point are unable to vote in-person and who now face conflicting guidance, from the courts and executive branch officials, about their eligibility to vote absentee in future elections. It is clear that a more comprehensive solution is needed in the long term to ensure that eligible incarcerated voters can adequately exercise their fundamental right to vote.

Nonetheless, given the unprecedented nature of the Supreme Court’s decision, resulting in a crisis of confusion in the administration of an election taking place in just a few short weeks, we reserve the necessity of determining a constitutionally stable solution (i.e., in-person voting booths at prison facilities) immediately following November 8, 2022.



Most immediately, though, voters desperately need clarity with regard to this election cycle.

Please do not hesitate to contact me to discuss this matter. We are committed to working with the Attorney General, DDOE, and DDOC to come to the appropriate solution to this issue. We look forward to your response, which we hope to receive by October 18, 2022.

/s/ Dwayne J. Bensing
Dwayne J. Bensing
Legal Director
American Civil Liberties Union of Delaware
(302) 295-2113
dbensing@aclu-de.org

cc: Anthony J. Albence; Monroe Hudson, Jr.; Frank Broujos; Gregory E Smith; Heather Zwickert; Sen. Marie Pinkney; Rep. Eric Morrison; Sen. Kyle Evans Gay; Jon Sheehan; Karen E. Keller



STATE OF DELAWARE
DEPARTMENT OF ELECTIONS

September 20, 2022

Via email to: dbensing@aclu-de.org

Dwayne J. Bensing, Esq.
Legal Director
ACLU of Delaware
110 West 10th Street, Suite 706
Wilmington, DE 19801

RE: Voter Registration and Absentee Ballot Processing for Eligible Incarcerated Persons

Dear Mr. Bensing:

Thank you for your letter of September 16, 2022 in which you contend that the Court of Chancery's recent ruling on the Vote-by-Mail litigation has "completely disenfranchised" incarcerated individuals who are otherwise eligible to vote, and in which you demand that the Department of Elections ("DOE") provide reasonable assurances that "eligible voters will be provided an opportunity to register to vote and vote in the 2022 General Election concluding on November 8, 2022, as demonstrated by providing the opportunity for eligible voters detained in [Department of Correction] custody to register to vote via same day voting or otherwise, and to vote in the November 8, 2022 General Election by providing a voting booth and voting machine staffed by [Department of Elections] at every location where eligible voters are being detained by DDOC."

The Court of Chancery's recent ruling in the Vote-by-Mail litigation does not impact the ability of eligible voters who are incarcerated in Delaware prison facilities to vote by absentee ballot. The "otherwise eligible persons who are incarcerated" absentee reason, which falls under the "Business or Occupation" reason set forth in Article V, Section 4A of the Delaware Constitution, is expressly included on the Department of Elections 2022 absentee ballot application form as a specific and authorized reason for voting absentee. The "otherwise eligible persons who are incarcerated" absentee reason has appeared on the Department's absentee ballot application for several election cycles. DOE has accepted, and will continue to accept, absentee ballot applications that are submitted with this reason. Therefore, these potential absentee voters

<https://h1ote.d.go.>

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SUSSEX COUNTY OFFICE
119N RACE ST
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PHONE: (302) 856-5367
STGP001 VI.17/7/2015

are not, and have never been, "completely disenfranchised" as you contend. Please note that although these incarcerated individuals are able to register to vote up to and including Election Day, like all other absentee voters who will not have access to a voting machine at a polling place, they will need to ensure their absentee ballots are received by DOE by 8:00 p.m. on November 8th.

As you know, DOE has been working diligently with the Department of Correction ("DOC") to ensure eligible voters in DOC custody are able to register vote (if not already registered) and to exercise their right to vote by casting an absentee ballot. To that end, over the past several weeks the DOE, in cooperation with DOC, has:

- Prepared a detailed 11" x 14" informational poster (for posting in common areas in all DOC facilities) containing voter eligibility requirements, voter registration information and instructions, absentee ballot application instructions, as well as DOE contact information (including a direct dial number for incarcerated individuals to call to access a live DOE subject-matter expert);
- Provided copies of voter registration forms and absentee ballot applications; and
- Provided live training via Zoom to DOC mail room staff (across all facilities) to educate them on the appearance of incoming and outgoing absentee ballot envelopes, and absentee ballots (copies were provided as well), to facilitate the delivery and return of absentee ballots to those incarcerated individuals who request them from DOE.

DOE remains committed to continuing to work with DOC to ensure incarcerated individuals who are otherwise eligible to vote have access to the information and materials needed (1) to register to vote (if they so choose); and (2) to vote via absentee ballot should they further choose to exercise their right to vote in the upcoming November 8th General Election.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Albence", followed by a long horizontal line extending to the right.

Anthony Albence
State Election Commissioner

cc: Frank Broujos, Deputy Attorney General, Delaware Department of Justice
Momoe B. Hudson, Jr; Commissioner, Delaware Department of Correction
Gregory E. Smith, Deputy Attorney General, Delaware Department of Justice